IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL D. MICCOLI,	:	CIVIL ACTION
	:	NO. 99-3825
Plaintiff,	:	
	:	
v.	:	
	:	
RAY COMMUNICATIONS, INC., ET. AL.,	:	
	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. JULY 20, 2000

I. BACKGROUND

The plaintiff, Michael D. Miccoli (plaintiff), was employed by the defendant, Ray Communications, Inc. (defendant), as a telecommunication systems installer from September, 1994 until May, 1997. While plaintiff was employed by defendant, there were in effect certain contracts between defendant and the United States government ("government contracts") requiring defendant to install telecommunication systems at government owned or government funded facilities. Plaintiff was assigned by defendant to work under several of these government contracts. The government contracts required defendant to compensate employees who performed work under the government contracts at a certain contractual wage rate ("contract rate"). The contract rate was intended to satisfy the statutory mandate that employees working under certain government contracts be paid at the prevailing wage rate for the community. Plaintiff claims that he

was paid at a wage rate below the contract rate for work he performed under the government contracts.

Plaintiff contends that he is a third party beneficiary to the government contracts under which he performed work for defendant. Plaintiff claims that he is entitled to recover the difference between the wages he was paid by defendant and the wages he should have been paid at the contract rate. Plaintiff also argues that he is owed approximately $250.00 in unpaid overtime compensation which defendant has withheld in violation of the Fair Labor Standards Act (FLSA). Finally, plaintiff claims that under the Pennsylvania Wage Payment and Collection Law (WPCL), certain of defendant's officers are personally liable for the unpaid wages plaintiff claims.

Defendant counters that plaintiff's third party beneficiary claim must be dismissed because it is in essence a private right of action under the Davis-Bacon Act and/or the Service Contract Act, federal statutes under which no private right of action is recognized. Defendant further contends that plaintiff's FLSA claim is time barred because plaintiff failed to initiate this action within the applicable statute of limitations. Finally, defendant contends that because plaintiff is not entitled to any unpaid wages, his WPCL claim must also fail.

Presently before the court is defendant's motion for summary judgment. For the following reasons, defendant's motion will be

granted in its entirety.

II. LEGAL STANDARD

Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Where the movant is the party bearing the burden of proof at trial, it must come forward with evidence entitling it to a directed verdict. Paramount Aviation Corp. v. Augusta, 178 F.3d 132, 146 (3d Cir. 1999), cert. denied, 120 S. Ct. 188 (1999). When ruling on a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348 (1986). The court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. See Big Apple BMW, Inc. v. BMW of N. Amer., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S. Ct. 1262 (1993).

The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). Once the movant has done so, however, the non-moving party cannot rest on its pleadings. See Fed. R. Civ. P. 56(e). Rather, the non-movant must then "make a showing sufficient to

establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505 (1986).

III. DISCUSSION

A. Plaintiff's Third Party Beneficiary Claim

Defendant contends that it is entitled to judgment on plaintiff's third party beneficiary claim because the claim is in essence a private right of action brought under the Davis-Bacon Act and/or the Service Contract Act, and no private right of action is recognized under either statute. Plaintiff counters that his claim is not predicated on either the Davis-Bacon Act or the Service Contract Act, but rather is based upon the terms of the government contracts in this case.

Under the Davis-Bacon Act, contracts to which the United States is a party for construction or repair of public buildings:

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on [similar projects]; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all . . . laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the

> time of payment, computed at wage rates not less than those stated in the advertised specifications. . . .

40 U.S.C.A. 276a(a). Similarly, under the Service Contract Act:

> Every contract . . . entered into by the United States . . . the principle purpose of which is to furnish services in the United States through the use of service employees, shall contain . . . [a] provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees . . . .

41 U.S.C.A. §351(a)(1).

In the Third Circuit, no private right of action is recognized for back wages under the Davis-Bacon Act. See Weber v. Heat Control Co., 579 F. Supp. 346, 348, (D.N.J. 1982), aff'd, 728 F.2d 599, 599 (3d Cir. 1984).[1] Although the Third Circuit has not addressed the specific question, other courts of appeals have found that no private right of action is recognized under the Service Contract Act. See Danielson v. Burnside-Ott Aviation Training Center, 941 F.2d 1220, 1227 (D.C. Cir. 1991); see also United States v. Double Day Office Services, Inc., 121 F.3d 531, 533 (9th Cir. 1997); Lee v. Flightsafety Services Corp., 20 F.3d 428, 431 (11th Cir. 1994); Hackett v. Martin Marietta Corp., 98

[1] In Weber, the Third Circuit, without further explanation, affirmed the district court's decision for the reasons stated by the district court. See Weber, 728 F.2d at 599-600 ("Judge Debevoise's [district court] opinion . . . fully reviews the statutory background and case law. We affirm for the reasons stated by Judge Debevoise."). Thus, further citation to "Weber" in this memorandum will refer to the district court opinion.

F.3d 1341 (Table), 1996 WL 577628, *2 (6th Cir. 1996)(unpublished opinion); 40 U.S.C.A. §352(b) ("In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.").[2] Rather, courts of appeals have generally concluded that both statutes provide an exclusive administrative mechanism for their enforcement. See United States v. Capeletti Bros., Inc., 621 F.2d 1309, 1315 (5th Cir. 1980);[3] Danielson, 941 F.2d at 1227. The issue presented in this case is whether plaintiff may circumvent the unavailability of a private right of action under either the Davis-Bacon Act or the Service Contract Act by styling his claim as one for third party beneficiary relief.[4]

A similar argument was advanced by the plaintiff in Grochowski v. AJET Construction Corp., 1999 WL 688450 (S.D.N.Y.

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[2] Indeed, plaintiff does not contend that a private right of action is available under either the Davis-Bacon Act or the Service Contract Act.

[3] Capeletti is cited because the court explicitly adopted its reasoning in Weber. See Weber, 579 F. Supp. at 348 ("I believe Capelletti (sic), finding no private right of action, is the better reasoned opinion, and I will follow both its analysis and its result.").

[4] Plaintiff does not dispute that each of the government contracts at issue in this case is subject to either the Davis-Bacon Act or the Service Contract Act. In some instances, the court's analysis refers only to either the Davis-Bacon Act or the Service Contract Act, however, because of the similarities between the two, the court's analysis applies equally to both statutes.

1999). In that case, the plaintiffs brought a state law contract claim for unpaid wages allegedly due under government contracts subject to the Davis-Bacon Act's prevailing wage provision. The court dismissed the plaintiffs' claim, finding that "common law remedies were not available to create a cause of action under the federally funded contracts because the applicable statute for purposes of the federal contracts, the Davis-Bacon Act, does not afford plaintiffs a private right of action." Grochowski, 1999 WL 688450, at *3.

Similarly, in Danielson, the plaintiff asserted a RICO claim to recover the prevailing wage rate contained in a government contract subject to the Service Contract Act. The court first found that the Service Contract Act does not afford employees a private right of action. Danielson, 941 F.2d at 1220. The court next found that the plaintiff's decision to frame his claim as a RICO claim, rather than a claim brought under the Service Contract Act itself, could not shield the claim from dismissal. Specifically, the court stated, "To call the violation of the [Service Contract Act] 'a pattern of racketeering' does nothing to persuade this Court that Congress intended the [Service Contract Act] to create a private cause of action." Id. Thus, the court held that a "private civil action, even couched in RICO terms, will not lie for an alleged breach of the [Service Contract Act]." Id. at 1229.

Applying the teachings of Grochowski and Danielson to this case, the court concludes that plaintiff's claim, no matter how creative the choice of nomenclature, is in reality a private claim for back wages under the Davis-Bacon Act and the Service Contract Act. Neither statute allows for such a claim.[5]

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[5] The jurisprudence surrounding §503 of the Rehabilitation Act, which contains language similar to that used in the Davis Bacon Act and the Service Contract Act, is instructive on the issue before the court. Compare 40 U.S.C.A. §276a(a) (Davis Bacon Act) and 41 U.S.C.A. §351(a)(1) with 29 U.S.C.A. §793(a) (Rehabilitation Act). Section 503 of the Rehabilitation Act requires parties to government contracts in excess of $10,000 "for the procurement of personal property and nonpersonal services" to take affirmative action to employ individuals with disabilities. 29 U.S.C.A. §793(a). In the Third Circuit, as in many other courts of appeals across the country, no private right of action is available to enforce §503(a)'s affirmative action provision. See Beam v. Sun Shipbuilding & Dry Dock Co., 679 F.2d 1077, 1078 (3d Cir. 1982); see also Davis v. Ohio Barge Line, Inc., 697 F.2d 549, 556 (3d Cir. 1983)(citing Beam).

In D'Amato v. Wisconsin Gas Company, 760 F.2d 1474 (7th Cir. 1985), the plaintiff asserted a third party beneficiary claim based upon the affirmative action provision of a government contract covered by §503 of the Rehabilitation Act. D'Amato, 760 F.2d at 1478. The court concluded that because the administrative remedies available under §503(b) are "the sole avenue of redress for the handicapped," the plaintiff's third party beneficiary claim must fail. Id. at 1484; see also Howard v. Uniroyal, Inc., 719 F.2d 1552, 1559-60 (11th Cir. 1983)("The detail and precision with which Congress provided the means for the enforcement of the affirmative action clause makes it reasonable to infer that Congress left no room in section 503(b) for state contract actions to supplement it.").

Like §503 of the Rehabilitation Act, both the Davis-Bacon Act and the Service Contract Act mandate that certain provisions be included in government contracts. See 40 U.S.C.A. §276a(a); 41 U.S.C.A. §351(a)(1). Also like §503, the administrative scheme in place for enforcing the Davis-Bacon Act and Service Contract Act's prevailing wage provision is the sole method of redress for individuals alleging a violation of those contractual provisions. See Capeletti, 621 F.2d at 1315-17; Danielson, 941 F.2d at 1227. Thus, like in D'Amato, plaintiff's third party

Therefore, defendant is entitled to judgment on plaintiff's third party beneficiary claim.[6]

B. Plaintiff's FLSA Overtime Claim

Defendant contends that it is entitled to judgment on plaintiff's FLSA claim because plaintiff failed to initiate this action seeking unpaid overtime compensation within the applicable statute of limitations. The court agrees.

Under the FLSA, a claim for unpaid overtime compensation is subject to a two (2) year statute of limitations, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . . ." 29 U.S.C.A. §255(a). In this case, plaintiff claims that he is entitled to unpaid overtime compensation for the pay periods ending May 18, 1996 and June 8, 1996. See Plaintiff's Answers to Defendant's Interrogatories-Second Set, Def.'s Mem. (doc. no. 29), Ex. F. Plaintiff, however, failed to file a complaint seeking to recover unpaid overtime compensation until

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beneficiary claim must be dismissed because it is not permitted under the applicable statutes.

[6] Defendant also argues that plaintiff's third party beneficiary claim must be dismissed because it is preempted by the Labor Management Relations Act and because plaintiff failed to exhaust the grievance procedure contained in the governing collective bargaining agreement before initiating this action. Because the court determines that plaintiff's claim is prohibited as a de facto private right of action brought under the Davis-Bacon Act and the Service Contract Act, it is unnecessary to address defendant's further arguments.

July 29, 1999, over three (3) years after his cause of action accrued.[7] Thus, plaintiff's FLSA claim is time barred.

Plaintiff argues that the statute of limitations on his FLSA claim was extended in this case under the doctrine of equitable tolling. Under the FLSA, employers are required to display an explanation of their employees' right to increased overtime compensation. See 29 C.F.R. §516.4. An employer's failure to display the required material tolls the applicable statute of limitations. Kamens v. Summit Stainless, Inc., 586 F. Supp. 324, 328 (E.D. Pa. 1984)(citing Bonham v. Dresser Industries, 569 F.2d 187, 193 (3d Cir. 1978)).

While plaintiff contends that defendant's conduct tolled the statute of limitations in this case, he has pointed to no evidence of record to support his argument that defendant in fact failed to post the information required under the FLSA. See Pl.'s Mem., p. 14. Thus, the naked allegation in plaintiff's first amended complaint that "[d]efendants failed to post the applicable wage and hour provisions as required by law," in the absence of supporting evidence of record, is insufficient to avoid summary judgment. See Section II, supra. Thus, defendant is entitled to judgment on plaintiff's FLSA overtime claim.

C. Plaintiff's Pennsylvania Wage Payment and Collection Law Claim

[7] Plaintiff does not argue that his cause of action under the FLSA accrued after May 18, 1996 or June 8, 1996.

The Pennsylvania Wage Payment and Collection Law (WPCL) provides, in pertinent part, "Every employer shall pay all wages, other than fringe benefits and wage supplements, due to his employees on regular paydays designated in advance by the employer." 43 Pa. Cons. Stat. Ann. §260.3(a). The WPCL 'does not create an employee's substantive right to compensation; rather, it only establishes an employee's right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement.' Hartman v. Baker, __ A.2d __, 2000 WL 527891, at *4 (Pa. Super. May 3, 2000)(quotation omitted).

As explained in sections III(A) and III(B), supra, plaintiff has not established a substantive right to compensation which may be enforced though the WPCL. Therefore, defendant is entitled to judgment on plaintiff's WPCL claim.[8]

IV. CONCLUSION

Plaintiff's third party beneficiary claim must be dismissed as an attempt to pursue a private right of action under the Davis-Bacon Act and/or the Service Contract Act where none is recognized. Plaintiff's FLSA claim must be dismissed as untimely, and plaintiff's Pennsylvania WPCL claim must be

[8] Defendant also argues that plaintiff's Pennsylvania WPCL claim is preempted by the Labor Management Relations Act and the National Labor Relations Act. The court's disposition of plaintiff's claim renders discussion of defendant's argument unnecessary.

dismissed because plaintiff has not established a substantive right to compensation which may be enforced under the statute. Accordingly, judgment on all claims in favor of defendant is appropriate.

An appropriate Order follows.